Filed 10/27/16 In re R.H. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re R.H., a Person Coming Under the Juvenile Court Law. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. RAQUEL C., Defendant and Appellant.	B271877 (Los Angeles County Super. Ct. No. DK04074)

APPEAL from an order of the Superior Court of Los Angeles County, Julie Fox Blackshaw, Judge. Reversed and remanded with directions.

Emery El Habiby for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Julia Roberson, Deputy County Counsel for Plaintiff and Respondent.

Raquel C. (mother) appeals an order of the juvenile court terminating parental rights as to her daughter, R.H. (Welf. & Inst. Code, § 366.26.)[1] R.H.'s father, Roman H. (father), is not a party to this appeal. Mother contends that the juvenile court erred by failing to reinstate her reunification services after she participated in a drug rehabilitation program (§ 388), and by finding that the beneficial relationship exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)) did not apply. Mother also contends that the Los Angeles County Department of Children and Family Services (DCFS) failed to properly investigate R.H.'s Indian heritage and to comply with the notice requirements of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.).

DCFS concedes that it did not comply with ICWA's inquiry and notice requirements, but it urges that the termination order was otherwise proper.

We conditionally reverse the order terminating parental rights and remand the case to the juvenile court with directions to order DCFS to comply with the inquiry and notice requirements of ICWA as described in this opinion. After proper notice, if the juvenile court finds that R.H. is an Indian child as defined by ICWA, the court shall proceed in conformity with all provisions of ICWA. Alternatively, if the court finds after proper

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[1] Statutory references are to the Welfare and Institutions Code unless otherwise noted.

notice that R.H. is not an Indian child, the judgment terminating parental rights shall be reinstated.

FACTUAL AND PROCEDURAL BACKGROUND

I.

Detention

On March 8, 2014, father was arrested for assault with a deadly weapon. When officers arrived to arrest father, they discovered mother was smoking marijuana in the hotel room where she, father, and two-month-old R.H. were living. Mother was arrested for child endangerment, and R.H. was taken into protective custody.

On March 12, 2014, DCFS filed a juvenile dependency petition pursuant to section 300, subdivisions (b) and (g). It alleged: Mother has a history of drug use and was under the influence of drugs while caring for R.H. (b-1); on March 8, 2014, mother was incarcerated and failed to make an appropriate plan for R.H.'s care (b-2, g-1); on March 8, 2014, father was incarcerated and failed to make an appropriate plan for R.H.'s care (b-3, g-2).

The juvenile court found a prima facie case for detaining R.H.

II.

ICWA Notice

Both parents filed ICWA-020 forms (Parental Notification of Indian Status) indicating possible Indian ancestry. Father indicated a possible connection to the Texas Comanche tribe, and mother stated her maternal great-grandmother (R.H.'s great-great-grandmother) may have been Apache. The court ordered DCFS to investigate father's claim of Comanche heritage and, for

reasons not clear from our record, ordered DCFS to investigate mother's claim of *Cherokee* heritage.

On April 24, 2014, DCFS interviewed mother about possible Indian heritage; mother stated that she might have Cherokee Indian in her ancestry through her mother's family, but she did not know if the maternal great-great-grandmother was a registered member of the Cherokee tribe. Mother was able to provide the names and dates of birth of the maternal grandmother and great-grandmother, and the name of the maternal great-great-grandmother. The maternal grandmother was not able to provide any additional information.

On April 25, 2014, DCFS sent ICWA notices to three Cherokee tribes and to the Comanche Nation. DCFS received response cards from the three Cherokee tribes and a letter from the Cherokee Nation stating that, "The child does not meet the definition of Indian child in relation to the Cherokee nation. . . . Therefore, the Cherokee Nation does not have legal standing to intervene based on the information exactly as provided by you." The ICWA notice provided to the Comanche Nation was "returned to sender – unable to forward."

On May 13, 2014, DCFS advised the court that father had been found not to have Indian heritage when he was a juvenile court dependent.

III.
Jurisdiction/Disposition Hearing; Six-Month Review Hearing; Termination of Mother's Family Reunification Services

In March 2014, mother was found guilty in criminal court of child cruelty and sentenced to four years probation. In April

2014, father was convicted of assault and sentenced to five years in state prison.

On June 26, 2014, the court sustained counts b-1, b-3, and g-2 of the petition. It found that substantial danger existed to R.H.'s physical health, there were no reasonable means to protect R.H. without removing her from her parents' custody, and R.H. was suitably placed in foster care. The court also found R.H. was not an Indian child within the meaning of ICWA. The court granted mother three hours of monitored visitation per week, and ordered mother to participate in individual counseling, parenting education, substance abuse counseling, and random drug/alcohol testing. Because of the length of his incarceration, father was not offered reunification services.

The six-month status review report (December 15, 2014) said mother had not regularly visited R.H., had not completed a parenting class, had not drug tested, and had not provided DCFS with any evidence of having attended individual therapy or a substance abuse program. R.H. was reported to be thriving in the home of her foster mother, to whom she was very attached. DCFS recommended that mother's family reunification services be terminated and the matter set for a hearing under section 366.26.

On December 15, 2014, the court set the matter for a contested six-month review hearing pursuant to section 366.21, subdivision (e).

The March 4, 2015 report said mother still had not complied with her case plan—she had not enrolled in a substance abuse program, drug tested, completed a parenting class, or regularly visited R.H. On March 4, 2015, following a hearing, the

court terminated mother's family reunification services and set a section 366.26 hearing for July 1, 2015.

In August 2015, R.H. was placed in a prospective adoptive home.

IV.
Section 388 Petition and Hearing; Termination of Parental Rights

On October 30, 2015, mother filed a "Request to Change Court Order" (§ 388) seeking reinstatement of her family reunification services. Mother asserted she had completed a three-month outpatient substance abuse program, where she consistently tested drug-free, and had enrolled in a residential program that would allow her daughter to live with her. Further, "I consistently visit my daughter and I have a very strong bond with my daughter." The court scheduled a hearing on mother's petition for January 25, 2016.

DCFS's January 25, 2016 report said that contrary to her representations, mother had not completed a three-month outpatient substance abuse program; instead, before completing the out-patient program, she asked to transfer to an in-patient program, which she also failed to complete. Mother still had not completed a parenting class or individual counseling. On December 30, 2015, mother agreed to submit to an on-demand drug test, but then failed to appear. Mother had not regularly visited R.H., frequently cancelling or appearing late for visits. Further, "[m]other has been late for visits and has not bonded with her child. [R.H.] screams for her foster mother and does not appear to want to be with her biological mother . . . . [R.H.] appears to want to go with her foster mother rather than spend

time with her bio-mother. She is looking for her foster mother the entire visit."

On March 17, 2016, mother was discharged from her substance abuse program for noncompliance.

On April 7, 2016, the court denied mother's section 388 petition and terminated parental rights. The court explained: "Unfortunately, while there may have been a change of circumstances when I decided to hold a hearing on the [section] 388 petition, I believe that with mother's recent discharge from the program, that circumstances are, at best, changing and not changed. And I do not find it to be in the best interest of the child. [¶] Mother has really been extremely spotty and inconsistent in her visitation. If the child [were] so important to her, she would have been more consistent in her visitation. . . . I think mother was either a no-show or late for the vast majority of the visits. I think there [were] only two or three visits where the mother actually arrived on time. And this is a young child who needs to have security and stability. And mother has not been able to show that. [¶] So I do not find . . . either that there are changed circumstances as of today's date or that it is in the best interests of the child to reopen reunification services or make a home-of-parent order for mother. So I will deny the [section] 388 petition." Further, the court rejected mother's counsel's contention that the parent-child bond exception applied, noting that mother had not maintained regular visitation and there was no evidence of a parent-child bond.

Mother timely appealed from the April 7, 2016 order.

DISCUSSION

Mother contends: (1) The juvenile court abused its discretion by denying her section 388 petition for reinstatement of reunification services; (2) the juvenile court improperly found that the beneficial relationship exception to termination did not apply; and (3) the Apache and Comanche tribes did not receive proper notice under ICWA.

I.
The Juvenile Court Did Not Err in Denying Mother's Section 388 Petition

"A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new or changed circumstances exist, and (2) the proposed change would promote the best interest of the child. [Citation.] The parent bears the burden to show both a ' "legitimate change of circumstances" ' and that undoing the prior order would be in the best interest of the child. [Citation.] The petition is addressed to the sound discretion of the juvenile court, and its decision will not be overturned on appeal in the absence of a clear abuse of discretion. [Citation.]" (*In re S.J.* (2008) 167 Cal.App.4th 953, 959-960.) An abuse of discretion occurs when the juvenile court has "exceeded the bounds of reason by making an arbitrary, capricious or patently absurd determination." (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 641-642.)

To support a section 388 petition, the change in circumstances must be "substantial." (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223.) After the termination of reunification services, "the goal of family reunification is no longer paramount, and ' "the focus shifts to the needs of the child for permanency

and stability" [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. [Citation.] A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child.' (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)" (*In re K.L.* (2016) 248 Cal.App.4th 52, 62.)

Mother urges that the juvenile court abused its discretion by denying her section 388 petition because substantial evidence showed a significant change in circumstances—namely, that mother "voluntarily" enrolled in an inpatient drug abuse program and "had completed the inpatient program, enrolled in an outpatient drug program, and was testing negative for drugs since January 2016." In fact, the record before the juvenile court shows that mother did not complete *either* an inpatient or an outpatient program: According to DCFS's January 25, 2016 report, mother enrolled in, but did not complete, an outpatient substance abuse program, instead requesting to transfer to an inpatient program, which she apparently also failed to complete. Subsequently, in March 2016, mother was discharged from another substance abuse program for noncompliance. Further, the record contains only three negative drug tests (on January 12, February 12, and February 19, 2016) after more than a year of missed on-demand drug testing. The juvenile court did not abuse its discretion in concluding that a single month of sobriety did not constitute changed circumstances sufficient to warrant reinstatement of mother's reunification services. (See, e.g., *In re Ernesto R.*, *supra*, 230 Cal.App.4th at p. 223 [mother's recent sobriety reflects " 'changing,' not changed, circumstances": Mother "is in the early stages of recovery, and is still addressing

a chronic substance abuse problem. [Citations.] [Mother's] completion of a drug treatment program, at this late a date, though commendable, is not a substantial change of circumstances."].)[2]

II.
The Juvenile Court Did Not Err in Finding That the Beneficial Parent-Child Relationship Exception Did Not Apply

Section 366.26 provides that if parents have failed to reunify with an adoptable child, the juvenile court must terminate parental rights and select adoption as the permanent plan for the child unless it finds that termination of parental rights would be detrimental to the child under one of four specified exceptions. Mother contends the juvenile court erred in failing to find that the exception contained in section 366.26, subdivision (c)(1)(B)(i) applies to her relationship with R.H.—i.e., that she "[1] ha[s] maintained regular visitation and contact with the child and [2] the child would benefit from continuing the relationship."

"Overcoming the statutory preference for adoption and avoiding the termination of parental rights requires the parent to show both that he or she has maintained regular visitation with the child and that the child would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(B)(i).) 'Sporadic visitation is insufficient to satisfy the first prong . . .' of the exception. [Citation.] Satisfying the second prong requires the parent to

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[2] Because we find substantial evidence supported the juvenile court's decision regarding no changed circumstances, we need not address mother's best interests argument. (§ 388, subd. (a).)

prove that 'severing the natural parent-child relationship would deprive the child of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed. [Citations.] A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent.' [Citation.]" (*In re Marcelo B.*, *supra*, 209 Cal.App.4th at p. 643.)

The issue for purposes of the statutory beneficial relationship exception "is not whether there was a bond between [parent] and [child]. The question is whether that relationship remained so significant and compelling in [the child's] life that the benefit of preserving it outweighed the stability and benefits of adoption. The ' "benefit" ' necessary to trigger this exception requires that ' "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." ' [Citations.]" (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 396-397.)

The beneficial relationship must be examined on a case-by-case basis, taking into account the many variables that can affect the parent-child relationship. (*In re Anthony B.*, *supra*, 239 Cal.App.4th at pp. 396-397.) We review the trial court's

finding for substantial evidence. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.)

There was substantial evidence in the present case to support the juvenile court's conclusion that the beneficial relationship exception did not apply. R.H., now more than two-and-a-half years old, has been in foster care since she was two months old. During R.H.'s more than two years in foster care, mother has visited sporadically, frequently arriving late to visits or missing visits altogether. In the first three months R.H. was out of her care (March – June 2014), mother missed seven visits with R.H., often cancelling visits shortly before they were scheduled to start. After she was granted twice weekly visits during the reunification period, mother continued to visit inconsistently, missing seven visits in June 2014, six visits in August 2014, seven visits in September 2014, and five visits in October 2014. Mother visited R.H. only twice in November 2014, and missed five visits in February 2015. After mother's reunification services were terminated in March 2015, mother missed five visits in March 2015, and six visits in April 2015. Between August 2015 and January 2016, mother missed 10 of 24 scheduled visits, and arrived late for 11 others.

Moreover, monitors reported that they frequently had to redirect mother during visits because she was on her cell phone or made inappropriate comments to R.H., including that her foster mother "is not her mother." More significantly, R.H. "screams for her foster mother and does not appear to want to be with her biological mother . . . . [R.H.] appears to want to go with her foster mother rather than spend time with her bio-mother. She is looking for her foster mother the entire visit." Mother herself admitted that R.H. looked to her foster mother when she

was upset, telling the social worker that " '[m]y visits don't go good [*sic*] because the focus is away from me. My daughter is used to the foster mother I guess because when she cries she goes to her. She's been with her longer.' "

On this record, there was more than substantial evidence that mother did not maintain regular visitation with R.H. and that R.H. would not benefit from continuing the relationship with mother. The juvenile court did not err in so concluding.

III.
A Limited Reversal and Remand Is Appropriate to Allow DCFS to Comply with the Indian Child Welfare Act

"When a dependency court has reason to know the proceeding involves an Indian child, the Department must notify the Indian child's tribe, or, if the tribe's identity or location cannot be determined, the Bureau of Indian Affairs, of the pending proceedings and of the right to intervene; and no proceeding to place the child in foster care or terminate parental rights shall be held until at least 10 days after the tribe or Bureau of Indian Affairs has received the notice. (25 U.S.C. § 1912, subd. (a); 25 C.F.R. § 23.11(c)(12) (2003).) Notice must be sent to all tribes of which a child may be a member or eligible for membership. (See *In re Louis S.* (2004) 117 Cal.App.4th 622, 632-633.) The notice must include the names of the child's ancestors and other identifying information, if known, and be sent registered mail, return receipt requested. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 175.) When proper notice is not given, the dependency court's order is voidable. (*In re Karla C.*, *supra*, 113 Cal.App.4th at p. 174; 25 U.S.C. § 1914.)" (*In re Brooke C.* (2005) 127 Cal.App.4th 377, 383-384.)

Mother argues that there were several problems with the ICWA notices in this case. First, while mother's ICWA-020 form indicated that R.H. might have Apache heritage through the maternal great-great-grandmother, the juvenile court directed DCFS to investigate mother's possible *Cherokee* heritage, and DCFS noticed the Cherokee, but not the Apache, tribes. Second, the ICWA-030 notice form DCFS sent to the tribes did not include maternal great-great-grandmother's name, even though mother had provided that information. Third, while father claimed to have Comanche heritage, the ICWA notice sent to the Comanche tribe was returned as undeliverable. The record does not reflect notice to the Comanche tribe was ever received, and the current notice address for the Comanche tribe is not the address DCFS used.

DCFS concedes that proper ICWA notice may not have been given in this case, and thus that the juvenile court's finding that ICWA did not apply was made prematurely. DCFS does not oppose a limited reversal and remand to allow it to give proper ICWA notice.

Where proper ICWA notice is not given, an order terminating parental rights is subject to limited reversal. (*In re Brooke C.*, *supra*, 127 Cal.App.4th at p. 385.) Accordingly, we order a limited reversal and remand of this case for DCFS to (1) further investigate mother's claimed Indian ancestry, (2) provide proper notice to any identified tribes (including the Comanche, Apache, and/or Cherokee tribes, as appropriate), the Bureau of Indian Affairs, and the Secretary of the Interior in accordance with ICWA, including listing all relative information

obtained from the family members[3] on the notice forms and sending them to the proper tribal addresses, and (3) submit all notices, signed return receipts, and any tribal responses to the juvenile court. Thereafter, if no tribe indicates R.H. is an Indian child, the juvenile court should make a finding that ICWA does not apply to this case and reinstate its order terminating parental rights. If a tribe indicates that R.H. is an Indian child, then the juvenile court should proceed in accordance with ICWA.

[3] Obviously, this should include maternal great-great grandmother's information.

DISPOSITION

The order terminating parental rights is reversed, and the case is remanded to the juvenile court with directions to order DCFS to comply with the inquiry and notice requirements of ICWA as described in this opinion. If, after proper notice, the juvenile court finds that R.H. is an Indian child as defined by ICWA, the court shall proceed in conformity with all provisions of ICWA. If the court finds after proper notice that R.H. is not an Indian child, the order terminating parental rights shall be reinstated.

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EDMON, P. J.

We concur:

ALDRICH, J.

STRATTON, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.